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in the

Supreme Court

of the

United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

BURR WILLIAM STUART,
Respondent.

On Petition for Writ of Certiorari To the District Court of Appeal of Florida, Third District

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP; 3) THAT ALL SO-CALLED "PROFILE" TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE UNDER *REID V. GEORGIA*, ____ U.S. ____, 100 S.CT. 2752 (1980) AND 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN *UNITED STATES V. MENDENHALL*, ____ U.S. ____, 100 S.CT. 1870 (1980); *SCHENCKLOTH V. BUSTAMONTE*, 412 U.S. 218 (1973) AND *TERRY V. OHIO*, 392 U.S. 1 (1968)?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the Florida trial court. The Respondent, BURR WILLIAM STUART, was the Appellee in the Florida District Court and the defendant in the Florida trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief.

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of page A1-A83.

I

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, reversing the Florida trial court's denial of the Defendant's Motion to Suppress, is reported at *Stuart v. State*, 389 So.2d 4 (Fla. 3d DCA 1980). The opinion of the Florida District Court is also contained in the State's Appendix at A71-A72. There is no official reporter for citation to this opinion.

II

JURISDICTION

On November 5, 1980, the District Court of Appeal of Florida, Third District, denied the State's timely Petition for Rehearing. A82. The State of Florida by timely Motion obtained an extension of time (per Justice Powell) in which to submit its Petition for Certiorari herein. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. *Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979), *approved and adopted*, *Hetland v. State*, 387 So.2d 963 (Fla. 1980). The Florida District Court *per curiam* opinion, makes the Florida District Court the Court of last resort herein as a matter of law. *Dodi Publishing Co. v. Editorial America* S.A., 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *see, St. Paul Title Insurance Co. v. Davis*, _ So.2d _ (Fla. 1980), Fla.S.Ct. Case No. 59,245, opinion filed November 13, 1980.[1]

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[1]The State filed a petition for review herein in the Florida Supreme Court, which the Florida Supreme Court dismissed upon a Suggestion of Dismissal. *See*, A84-A87.

III

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV

STATEMENT OF THE CASE

The Appellant, Burr W. Stuart, was charged by information with three counts consisting of unlawful possession of cocaine with intent to sell; battery upon a law enforcement officer and resisting arrest with violence arising out of his attempt on July 25, 1978 to transport cocaine in a body carry through Miami International Airport. At the hearing upon the motion to suppress herein, the Appellee produced two (2) witnesses Detective Charles McGhee and by deposition, Detective Michael Magdelena of the Dade County Public Safety Department airport narcotics organized crime bureau. *See*, A4; A59. Detective McGhee testified generally as to his extensive narcotics arrests and experience. *See*, A5-A7. He testified that on July 25, 1978, he was working in plain civilian clothes with Detective Magdelena at the Miami International Airport at about 6:30 p.m., when he observed the Defendant arriving at the terminal in a taxi. A8-A11. The Defendant was carrying an empty foldover luggage bag and appeared to Detective McGhee to be anxious and nervous. A11-A12. Detective McGhee ascertained that the Defendant had been in Miami less than twenty-four (24) hours and was going back to Houston, Texas in a few minutes. A15; A16; A18. Detective McGhee testified that in his experience, Houston is a narcotics transportation center. A9-A10. The appearance, actions and demeanor of the Defendant were significant to Detectives McGhee and Magdelena in their training and experience. *See*, A10-A18.

As the Defendant proceeded to the departure gate, Detective McGhee decided to approach the Defendant. A18. McGhee and Magdelena both testified that if a person they approach refuses to talk with them, he just gets on the plane and leaves. A58. Initially, as Detective McGhee approached the Defendant, the Defendant turned; achieved eye-contact with McGhee and then sprinted forward a few steps. A19. McGhee said to the Defendant "Sir, may I talk to you a few moments?" A19. When the Defendant responded and turned toward him, Detective McGhee said, "I would like to talk to you — would you have any objection?" A19. McGhee testified that the Defendant replied, "No," and then said, "What's this all about." A19-A20. McGhee then testified that:

> "At that time, I advised him — he asked what it was all about. I advised him we worked at the airport as police officers. I told him that our job was to look for things that would seem to be characteristic of people carrying contraband. I told him that our job was to see things that normally wouldn't — to see things that we probably wouldn't pay attention to.
>
> "I told him we would like to ask him a few questions. We asked him if he had any objections. He said, "No."
>
> A20.

McGhee specifically told the Defendant that he was free to go and that they wanted to talk only with his consent. See, A48; A22.

McGhee said that they *asked* the Defendant for identification and he produced his driver's license and also handed the detectives his airline ticket. A23. *After a minute, the license and ticket were returned to the Defendant.* A24. McGhee testified that the Defendant was extremely nervous and jerky and his speech became slurred and he stuttered. A26. McGhee said that the Defendant's shirt became saturated with perspiration. A26. After a brief conversation, McGhee asked the Defendant if he had any objection if they looked in the bag that the Defendant was carrying. A26. The Defendant said, "sure," and handed the bag to McGhee and said, "sure, you can look." A26. McGhee testified that the bag was empty except for one (1) T-shirt and one (1) pair of dungarees. A27. The bag had no toiletries or shaving gear. A27. McGhee then testified that:

> "Upon returning his bag to him, he dropped it off to the side. I stood up and said, "I'm not trying to hassle you or anything, but the things I have told you of people's characteristics carrying narcotics is similar to things you have displayed to us." I told him I would like his consent to pat him down and I asked if he had any objection. At that point, he threw his arms up in the air and with his arms spread, he said, "Sure. I haven't anything to hide. I haven't got anything."
>
> A28.

Detective McGhee, based upon his experience patted down the Defendant's torso; small of the back; and both legs and feet. *See*, A28. As Detective McGhee began examining the Defendant's right leg, the Defendant began quivering so much that his foot tapped the floor and Detective McGhee at that point, felt a lump in the Defendant's boot, which was malleable and powderlike, "crinkled" and was wrapped in plastic. A28. McGhee said that the Defendant was very nervous and appeared about to "break and run." A31.

Detective McGhee stood up; asked the Defendant what the substance was and the Defendant stuttered and said, "that's my money" and McGhee asked if he could see it. A31. Detective McGhee testified that in his experience the substance was a narcotic, probably cocaine and he told the Defendant that the substance certainly was not money. A32. The Defendant refused to permit examination of the lump. A31. Thereupon, the Defendant was given a *Miranda* warning to which he responded that he understood. A32. The Defendant and the detectives then moved a few feet to a locker area where McGhee began a second pat down. A33. Detective McGhee said that he wanted to pat the Defendant down because there were several hundred people and himself because of the Defendant's strange behavior and hyper condition. A34; A55. He said the Defendant was shaking so hard he was vibrating all over. Similarly, on cross-examination, Detective McGhee indicated that the reason that they identify themselves to drug couriers is to avoid defendants thinking that there is about to be a drug rip-off (and becoming violent). *See*, A51.

When Detective McGhee again reached for the Defendant's right boot, the Defendant kicked him and a violent struggle ensued. A34. At that point, Detective McGhee told the Defendant you're under arrest. A34. As Detective Magdelena put on one handcuff, the Defendant again struggled to break free and run, punching with his elbows. A35. The Defendant was finally subdued after a second struggle. A35. After arrest of the Defendant for the battery, and a search pursuant to his arrest, the substance in the right boot was ascertained to be cocaine in a plastic bag. A35; A36. The prosecutor indicated below that the testimony of Detective Magdelena would be cumulative; thereupon the parties stipulated the prior deposition of Detective Magdelena into evidence. A59. The defendant's testimony consisted of denials of the testimony of the officers or that he didn't remember. McGhee also testified briefly on rebuttal.

Upon these facts, the State vigorously argued, 1) the right of the police officers to approach anyone in a public area and engage them in conversation; 2) that the officers acquired articulable suspicion and or probable cause to search the bulge of cocaine during a consensual transaction with the Defendant and 3) that the body carry of cocaine was lawfully searched pursuant to the Defendant's lawful arrest for battery upon a police officer. *See* A60-A64. The Defendant argued that the entire transaction was a "profile" *stop* and that the Defendant's statement that he didn't consent should prevail. A64-A69.

Upon the foregoing facts, and argument, the Florida trial court below denied the Defendant's Motion to Suppress and Motion to Dismiss the battery charges.

A68. The view of the trial court, was it must upon this record make findings of fact as to who to believe. A64. The trial court found that the initial "stop" herein was nothing more than a voluntary contact between a citizen on the street and police officers in a position that they had a right to be. A67. The court held that the more credible testimony reveals that the Defendant consented to the initial conversation and then to the first pat down, which revealed the bulge in the Defendant's foot. A68. The Court held that the more credible evidence revealed that the defendant was highly agitated and his behavior was unusual and that the substance in his boot was in fact contraband narcotics — cocaine. *See*, A67-A68. The Court held that the officers had, *"suspicion which arose justifiably,"* that the bulge was narcotics. A68. More importantly however, before the bulge was examined the second time, the Florida trial court held as a matter of fact that the Defendant began "the fracas and caused the fight." A68. The trial court explained its holding thus:

> "THE COURT: I understand. I really think it is a factual finding. I am going to have to make a factual finding.
>
> I find the initial stop would not be justified under any profile. The initial stop in conversation in fact is justified based on the rights of a police officer to stop and talk to anybody he wishes.
>
> They are not obligated to talk to them. In my mind, the more credible evidence supports that

the initial conversation with the defendant was in fact one where the defendant consented to talk to the officers. Thereafter, consent to allow them to go through his luggage and to search him — [*Court Reporter's omission*] I am not convinced that it is true for the purpose of this hearing. I find it to be more credible that the defendant is carrying a considerable amount of cocaine in his boot. I find it hard to believe he would not be nervous. I think the officer's testimony concerning the agitated state of the defendant sounds more credible under the circumstances.

I have not finished. I will give you a chance. I find it to be more credible when they began to search him they were unable to get to his boot. At that point, they moved him off to the side. I accept the version of the evidence that says when they got to search him again and they had a right to at that time because there was suspicion which arose justifiably. At that point, when they began to search him and the struggle ensued, it was the defendant who began the fracas and caused the fight.

THE COURT: That is the way I feel, sir.

MR. COHN: Judge, the question is how the suspicion was aroused.

THE COURT: He consented to the bag and became agitated and nervous. When they searched his body, he became more agitated and —

MR. COHN: Why was their suspicion aroused?

THE COURT: From that point, it is downhill. Up to that time, it is downhill. They had no right to search merely because he was within the characteristics of the DEA profile.

MR. COHN: I do not think the State has met its burden.

THE COURT: Mr. Cohn, I do. I feel that the State has shown a consent. It is not true in all cases, but it is more believable in this case. Somebody has to make a decision on who to believe.

MR. COHN: Why burden the defendant with this appeal?

THE COURT: The State pays me a lot of money to make decisions. It does not mean it is in favor of the State but I have to.

I will find in favor of the State. I will deny the motion to suppress."

A67-A69.

Thereupon, the Defendant subsequently pleaded nolo contendere and appealed to the Third District Court of Appeal of Florida. *See*, A70; *see also, Brown v. State*, 376 So.2d 382 (Fla. 1979).

On appeal to the District Court of Appeal of Florida, for the Third District, the District Court reversed the

trial court holding that the mere approach of the officers was a stop, *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) (Schwartz, J.) and that all so-called "profile" stops are unconstitutional no matter what the observed facts are, *Royer v. State*, 389 So.2d 1008 (Fla. 3d DCA 1980) (Schwartz, J.). The Florida District Courts opinion states only in a summary fashion thus:

> "PER CURIAM.
>
> "The appellant's judgment of conviction is reversed with directions to discharge him from custody. Because of the reasons and authorities stated in *Royer v. State*, 389 So.2d 1008 (Fla. 3d DCA 1980) (Case No. 78-1050, opinion filed September 9, 1980) (en banc) and *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979), we find the trial court erroneously denied appellant's motion to suppress the physical evidence."
>
> A71-A72.

The State filed an extensive Petition for Rehearing, which was summarily denied. A73-A82.

V

SUMMARY OF ARGUMENT

The decision of the Florida District Court, construing the Fourth Amendment of the United States Constitution holding: 1) That the mere approach of a police officer is a detention/stop; 2) that the facts herein constitute a stop; 3) that all so-called "profile" transactions are illegal no matter what the facts are under *Reid v. Georgia*, ___ U.S. ___, 100 S.Ct. 2752 (1980) and 4) that the consent and search herein were therefore illegal, is in direct and substantial conflict with the rule of this court in *United States v. Mendenhall*, ___, U.S. ___, 100 S.Ct. 1870 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Terry v. Ohio*, 392 U.S. 1 (1968). In view of this Court's recent decision in *Mendenhall* and *Reid v. Georgia*, ___ U.S. _, 100 S.Ct. 2752 (1980) leaving the present issues in a state of some confusion, this Honorable Court should correct this patent misconstruction of the United States Constitution. The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful interdiction of chronic narcotics traffic. *See, United States v. Williams*, 622 F.2d 80 (5th Cir. 1980), *en banc.*

VI

ARGUMENT

The decision of the Florida Courts cannot be reconciled with the decisions of this Court in *United States v. Mendenhall*, ___ U.S. ___, 100 S.Ct. 1870 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Robinson*, 414 U.S. 218 (1973) and *Adams v. Williams*, 407 U.S. 143 (1972). The State submits first of all, that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and Fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. *Terry v. Ohio; United States v. Mendenhall. Secondly*, the Defendant's extraordinary demeanor, coupled with his denial of the obvious content of the body carry of cocaine, which was discovered pursuant to a consensual pat down, provided the officers with reasonable and articulable suspicion for a further investigation. *See, Adams v. Williams*, 407 U.S. 143 at 145-146 (1972). When the Defendant resisted a second examination and battered the officers, the body carry of cocaine was clearly lawfully recovered as incident to his arrrest. *United States v. Robinson*, 414 U.S. 218 (1973). In the controlling decisions herein in *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980) (Schwartz, J.) (*reversing reported panel opinion en banc*) and *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) (Schwartz, J.) the Florida Third District Court of Appeal has rejected the mandate of *Terry, Mendenhall, Schneckloth*, and *Adams v. Williams*, in the airport context, in favor of what it erroneously perceives as the ruling of this Court in *Reid v. Georgia*, _ U.S. _, 100

S.Ct. 2752 (1980) and gives force of law to a previous *"attraction"* to the concept that *any* approach by a police officer is a "stop." *See, Frost,* 374 So.2d at 597-598; *Royer,* 389 So.2d at 1019. Under the guise of *Royer,* and *Reid* the Florida Third District Court of Appeal has embarked upon a course of wholesale reversals of Florida trial court findings of consent and articulable suspicion in the airport context. *See, Correa v. State,* 389 So.2d 1204 (Fla. 3d DCA 1980) (*reversed upon rehearing subsequent to Royer assuming that the mere approach of a police officer is a "show of authority"*); *Stuart v. State,* 389 So.2d 4 (Fla. 3d DCA 1980) (*'reversed see Royer* and *Frost'); Harrison v. State,* 389 So.2d 293 (Fla. 3d DCA 1980) (*'reversed see Royer and Reid'*); *Major v. State,* 389 So.2d 1203 (Fla. 3d DCA 1980) (Schwartz, J.) (*reversed on rehearing after Royer even though the Defendant signed a written consent form and was advised of a right to refuse consent*); *Monohan v. State,* 390 So.2d 756 (Fla. 3d DCA 1980) (*assuming after Royer that the approach of narcotics officers in an airport is a "stop" per se*); *Cimino v. State,* 390 So.2d 795 (Fla. 3d DCA 1980) (*'reversed see Reid and Royer'*). As in the case at bar, the Florida Third District controls the substantive law in airport cases, located as it is, in Miami, Florida, the nation's most chronic drug courier terminal.[2] Furthermore, as in the case at bar, where

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[2]Just during the eighteen (18) month period from October 1, 1977, through May 31, 1979. the Miami International Airport unit *identified* three hundred and eighty-six (386) narcotics couriers and seized thirty (30) pounds of quaaludes; four hundred and thirty (430) pounds of cocaine and fifteen thousand (15,000) *pounds* of marijuana *just* being transported through Miami International Airport in suitcases, briefcases, and in bodycarrys. A83. During an eight (8) month period preceding May 31, 1979, the Airport Narcotics Unit also seized twenty-four (24) pounds of heroin. Seizures of cocaine and marijuana in South Florida set national records for

the State has no other of avenue for review, this Honorable Court should take jurisdiction and overturn the Third District Court of Appeal.

In the case at bar, there is no testimony, but that the officers merely approached and contacted a citizen on the street. Under *Terry v. Ohio, supra*, and its progeny, a police officer may approach a citizen for three separate reasons: 1) arrest; 2) stop and investigation and 3) mere contact. *See, e.g., United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969); *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *see also, United States v. Mendenhall*. The predicate for each of these categories is different; as are the consequences. In order to justify an arrest, there must exist probable cause to believe that a crime has been committed and that the defendant committed it. In order to justify a *stop and detention*, the police must be able to articulate an objective, reasonable basis for belief that a crime has been, will be, or is currently being committed. *Terry v. Ohio, supra*. Such a stop gives the police the power to detain a citizen against his will for the limited purpose of investigation. The third form of approach, a mere *contact*, is directly applicable in the case at bar, and consists of simple common sense. *See, Terry v. Ohio; United States v. Mendenhall; United States v. Wylie*. In a mere *contact* the officer may not detain a citizen at all. He has only a common right to engage in voluntary conversation and if the citizen does not wish to respond, he need not, and

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(Footnote 2 continued)

frequency and quantity. These figures dwarf the seizures before this Court in *Mendenhall*. *See, United States v. Mendenhall*, 596 F.2d 706, at 708, n. 1 (6th Cir. 1979), Weick, J. *dissenting*.

may simply walk away. *See, e.g., United States v. Wylie*, at 67. This natural, common sense conclusion is predicated upon the fact that ordinary threshold discourse between police officers and citizens on the street is not cause for constitutional alarm. *Terry v. Ohio, United States v. Mendenhall.*

In *Terry v. Ohio*, the court, through Justice Warren, stated the applicable standards herein thus:

> "It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusion short of arrest."
>
> Id. at 26.

The court in *Terry* recognized that for the purpose of the Fourth Amendment, an "arrest and search" and a "stop" are to be considered "seizures." However, the court recognized that:

> "[N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the Officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."
>
> Id. at 19, n. 16.

Mr. Justice Harlan in his concurring opinion specifically recognized that the right of a police officer to address questions to other persons is a right possessed by

every citizen, co-existing with the *equal* right of the person addressed to ignore his interrogator and walk away. 392 U.S., *supra*, at 32, 33. Further, in the concurring opinion of Mr. Justice White, it is stated:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."

More recently in *United States v. Mendenhall*, the court recites preliminary facts virtually identical to those herein as *not tantamount to a seizure:*

> *"We adhere to the view that a person is "seized" only when by means of physical force of a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.* The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116.
>
> "On the facts of this case, no "seizure" of the respondent occurred. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. *Such conduct without more, did not amount to an*

intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket, and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See Terry v. Ohio, supra, 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1885 (Harlan, J., concurring). See also A.L.I., Model Code of Pre-Arraignment Procedure §110.1(1) and commentary at 257-261. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.

"Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses do not depend upon her having been so informed. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. *We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agent's questions.* It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

> "*The Court's decision last Term in Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, *on which the respondent relies, is not apposite.* It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. *In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him,"* Id., at 49, 99 S.Ct., at 2639. *UP TO THIS POINT THERE WAS NO SEIZURE.* But after continuing to protest, the officer's power to interrogate him, Brown was first frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer 'who has lawfully stopped him and requested the information.' " [Emphasis added].
>
> 100 S.Ct. at 1877-1878.

In the case at bar, consistent with the mandate of *Terry v. Ohio*, and *United States v. Mendenhall*, the trial court affirmatively found that the Defendant had voluntarily consented both to speak with the officers and to the initial pat down which revealed the body carry of cocaine. A67-A69. Consent is a question of fact for the trier of fact to determine from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It is fundamental appellate error for any appellate court to intrude upon such a determination where the record contains evidence to support such a

determination. In *United States v. Mendenhall*, this court succinctly explained that:

> "Although we have concluded that the initial encounter between the DEA agents and the respondent on the concourse at the Detroit airport did not constitute an unlawful seizure, it is still arguable that the respondent's Fourth Amendment protections were violated when she went from the concourse to the DEA office. Such a violation might in turn infect the subsequent search of the respondent's person.
>
> "The District Court specifically found that the respondent accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation' quoting Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1903, 20 L.Ed.2d 917. Notwithstanding this determination by the trial court, *the Court of Appeals evidently concluded that the agent's request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful.* But because the trial court's finding was sustained by the record, *THE COURT OF APPEALS WAS MISTAKEN IN SUBSTITUTING FOR THAT FINDING ITS VIEW OF THE EVIDENCE.* See Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965)."
>
> 100 S.Ct. at 1878.

See, also, State v. Nova, 361 So.2d 411 at 413 (Fla. 1978). In the case at bar *as in Mendenhall*, the events

herein 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant; 4) but instead the officers approached him and identified themselves; 5) requested but did not demand the Defendant's identification and ticket and 6) the officer's posed a few questions. These circumstances do *not* amount to a "stop" within the meaning of the United States Constitution. *Terry v. Ohio; United States v. Mendenhall; see also, United States v. Fry,* 622 F.2d 1218 (5th Cir. 1980); *United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979).

In *State v. Frost,* in a *state appeal,* the court *held* that because it was a state appeal, and the appellate record *failed to show* that the Appellant's license and airline ticket were *immediately* returned to the Appellant, the Court would *assume* the ticket and license were *not* immediately returned.[3] *See,* 374 So.2d at 595-596 at 598. The *Frost* court concluded that therefore *automatically,* a "stop" had been effected by the officers, despite the evidence to the contrary. *See,* 374 So.2d at 598; *contra, United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979) (*the momentary possession of the defendant's ticket is not a "stop"; the officers acquired articulable suspicion through the defendant's false identification prior to walking away the defendant's ticket*). The *Frost* court in its holding, further severely criticized the United States Fifth Circuit Court of Appeals in *Elmore,* for what the *Frost* court viewed, as *holding,* "that it makes a constitutional difference as to the

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[3]This issue was neither presented nor argued by anyone in the trial court.

restraint of one's liberty whether an officer with a traveler's ticket in his hand remains face to face with the individual or walks away from him" *and holding*, "that the fruits of an unlawful search or seizure [can] retroactively serve to sustain it." *See*, 374 So.2d at 598, n. 4. The *Elmore* court, did neither of these things, but rather, approved the right of a police officer to approach anyone on the street and engage him in voluntary conversation. *Accord, e.g., Terry v. Ohio* and *Mendenhall.*

Apart from the apparent holding in *Frost* above and *central* to the *Frost* court's complaint about Elmore, is the dicta in *Frost*, wherein the *Frost* court opined that:

> "In applying these standards to airport searches like the one involved in this case, many courts have held that a Fourth Amendment stop occurs as soon as officers initially approach an individual, identify themselves, and begin to question him. [Citing] *United States v. Coleman*, 450 F.Supp. 433, 439 (E.D. Mich. 1978) . . ."

In the case at bar, it was undisputed that the Defendant's ticket and license were returned after only a momentary examination. Thus it is wholly apparent that the *"attraction"* in *Frost* is now given force of law in the case at bar. *See, also, Monohan v. State*, 390 So.2d at 757; *Correa v. State*, 389 So.2d 1205; *Cimino v. State, supra; Major v. State*, 389 So.2d at 1204. In *Monohan, Correa* and *Major* the Florida Third District Court assumes a constitutional *"stop"* and/or couches its analysis in terms of a constitutional *"submission to authority,"* where all that has occurred (*as in the case at bar*), is identification by the plain clothes narcotics officers

and their asking if the courier has a moment to talk and/or *asking* for consent. This analysis under the guise of this Court's opinion in *Reid v. Georgia*, is fundamentally erroneous and is causing the State of Florida grievous difficulty in the prosecution of narcotics couriers in the nation's most chronic narcotics traffic terminal.

In *Royer v. State*, the reported panel opinion *rejected* the *Frost* analysis above, 389 So.2d at 1011-1012, and adopted a view that observed facts, which happen to fit a "profile" were sufficient to provide articulable suspicion and/or eventual probable cause, 389 So.2d at 1014. In *Royer* the facts were identical to those in *Mendenhall*:

> "The facts leading up to the search and seizure of the marijuana were the following. Officers Johnson and Magdalena, of the Dade County Public Safety Department, were plainclothes detectives assigned to the County's Crime Bureau, Narcotics Investigation Section, performing duty at Miami International Airport as members of what was known as the Smuggling Detail, consisting of a sergeant, and eight officers, who worked in pairs, on shifts. Said officers had acquired knowledge of a "profile" by which it was possible with a substantial measure of certainty to recognize couriers or carriers of drugs in air travel. Such profile had been arrived at by experiences of narcotics officers with a great number of such persons in main drug distribution centers and the target city destination places.
>
> Miami was a known point from which imported drugs, including marijuana, were transported

to other target destination cities, one of which was New York City. It was known that commercial airlines were used for such transport of drugs by such couriers and others. On a certain day, at the Miami International Airport, the above-named officers observed the defendant as he was about to purchase a ticket on an airline. The defendant's appearance and mannerisms, his luggage and the way he dealt with it, and his means of obtaining his ticket, etc., as observed by the officers were such as to fit the profile, the details and nature of which we purposely do not here state. As disclosed through the testimony of Officer Johnson, the defendant was observed to fit the profile of a drug courier.

The defendant checked his two suitcases, placing identification labels thereon bearing the name "Holt", but without stating his address or telephone number in the spaces provided therefor on the labels. The officers noted the name which the defendant placed on the suitcases. As the defendant was proceeding to enter the concourse leading to the boarding area, after having obtained his ticket and checked his suitcases, the officers approached him, identified themselves as police officers, and asked him if he had time to talk with them, which he said he did. There followed a series of requests by the officers, to none of which the defendant objected, and to each of which the defendant assented. Those consisted of his initial consent to talk to the officers, his production upon request of his ticket (which

was to New York City), and his driver's license for identification (which showed his name on the ticket); his consent to move with them out of the main room into a vacant side room for further conversation; his consent to the officer's request that the suitcases be opened (after Johnson had retrieved the suitcases). When the officers requested his consent to the opening of the suitcases, the defendant produced a key from his pocket and unlocked one of the cases. He explained that he did not know the combination of the combination lock on the other suitcase, and upon request gave his consent to the opening of the other case by the officers, which they did with the aid of a screwdriver. The search revealed the suitcases contained 65 pounds of marijuana."

389 So.2d at 1008-1009.

The *panel opinion* affirmed the concept of a mere contact and consent, opining that:

"Here there was no coercive action by the officers. There was no use of force. They did not touch him, or display any weapon, or make any demands. There was no show of force other than the fact, as revealed to the defendant, that Johnson and Magdalena were police officers. The statement to the defendant by one of the officers, when requesting his consent to the opening of the suitcases, that they had reason to believe the cases contained drugs or contraband was not a threat, but rather an explanation of why they were requesting consent

> to search the cases. The requests which the officers made of the defendant were made politely, and the defendant so testified."
>
> Id. at 1010.

Upon rehearing, the *dissent* to the panel opinion authored the *en banc* reversal of both the previous panel and the trial court, holding that under *Frost, supra,* the defendant was *"arrested"* when he consented to go to the *"interrogation room."* 389 So.2d 1018-1019. Mirroring its previous dissenting opinion, the *en banc* opinion refers to the factual finding of consent by the trial court as, "THE ALLEGED CONSENT." Id at 1019. The new opinion also rejects the fact that the defendant gave an alias to the airlines as *inconsequential* and further *ridicules* the narcotics officer's observations as *"amateur psychiatry"* that should be *"completely disregarded." Id,* at 1016-1017; 1016, n. 4. The District Court, per Schwartz, J., then concluded that under *Reid v. Georgia,* all so called *"profile"* stops were illegal irrespective of what the *observed* facts are, and noted that *Mendenhall* is *"contra."* 389 So.2d at 1019, and 1017 n. 6. Important to the present analysis, the *Royer* court also refused to dispell or disapprove of the *dicta* in *Frost* that a constitutional "stop" occurs as soon as a policeman identifies himself to a citizen on the street. *Id.,* at 1018 n. 8.

The State of Florida in the case at bar and in the decisions noted above is, faced with a judicial impasse in the Third District Court of Appeal, the seat of the nation's most chronic drug traffic. It is plainly evident in the case at bar, that *contrary* to *Terry v. Ohio; Schneckloth v. Bustamonte* and *United States v.*

Mendenhall, the Florida District Court has departed from any correct constitutional analysis under the guise of this court's views in *Reid v. Georgia*. The utter confusion in the controlling opinion in *Royer* as to this Court's opinions in *Reid* and *Mendenhall*, is causing substantial disruption and confusion in the State's prosecution efforts. The Florida District Court's absolute rejection of the facts herein as *not* amounting to consent and to articulable suspicion within the meaning of the Fourth Amendment is utterly erroneous. The failure of the Florida District Court to properly apply this Court's recent decisions in the *Reid* and *Mendenhall* is emblematic of its failure to properly apply *Terry v. Ohio*, in the airport context. At each carefully defined step, from initial observation to investigation, the officers' conduct was completely in compliance with the applicable legal requirements. *See, United States v. Vasquez-Santiago*, 601 F.2d 1069 (2d Cir. 1979). The meshing of practical police considerations and Fourth Amendment theory is achieved through a proper balancing of these competing interests. *Delaware v. Prouse*, ___ U.S. ___, 99 S.Ct. 1391, 1396 (1979); *See also, United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Garcia*, 450 F.Supp. 1020 (E.D.N.Y. 1978). Similarly, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court explained:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an

intermediate response. See id., at 23, 88 S.Ct., at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [citations omitted]".

Id., at 145-146.

The Florida District Court under the guise of the Fourth Amendment has abrogated the properly application of the Fourth Amendment explained by both *Terry v. Ohio* and *Adams v. Williams.* The Florida District Court, in applying the Fourth Amendment to the airport context herein, has failed utterly to apply the balancing test under the Fourth Amendment explained by this Court in *Delaware v. Prouse,* and as exemplified in *Mendenhall. See, also, United States v. Williams,* 622 F.2d 80 (5th Cir. 1980), *en banc.* The District Court herein and in the decisions noted above has created a rule of law under the Fourth Amendment, where all any experienced courier need do in Florida, is to reveal all and then complain that he only acted pursuant to a subjective implied coercion. This Court rejected such as analysis in *Schneckloth,* thus:

"It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against

> *him and then contending that he acted only in response to an implied assertion of unlawful authority.* [Quoting People v. Michael, 45 Cal.2d at 754, 290 P.2d, at 854, Traynor, J.]" [Emphasis added].
>
> 412 U.S. at 230.

Accord, United States v. Gorman, 355 F.2d 151 at 158-159 (2d Cir. 1965). Similarly, with respect to the wholly subjective complaints of the Defendant, *Schneckloth* also held that:

> "[In Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1970)] the court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. *We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police.* "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." Id., at 488, 91 S.Ct., at 2049. [Emphasis added].
>
> Id., at 234, n. 15.

Accord, Mendenhall,

In the case at bar, the officers simply responded in good faith to the obvious circumstances, which they observed as trained narcotics investigators. The officers also responded in good faith to the overt manifestations

of consent of the Defendant. The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United States Constitution. *See, United States v. Williams, supra; see also, Stone v. Powell,* 428 U.S. 465, 496-516 (1976) (Burger, J. concurring). Where the exclusionary rule has served its purpose it should not be extended now such that all it serves to do is to frustrate the interdiction of narcotics traffic. *See, Stone v. Powell; Williams, supra.*

VII

CONCLUSION

The officers herein acted in good faith and therefore the cocaine should *not* have been suppressed where its suppression only serves to frustrate the interdiction of chronic narcotics traffic. *See, United States v. Williams, supra.* Illicit narcotics traffic is a insidious cancer eating at the very fabric of our society. It is clear that narcotics traffic presents a clear and present danger to the underlying fabric of this nation. Certainly, illicit narcotics traffic has an embarrassing and substantial impact *when the notoriety of MIAMI as a drug terminal is judicially acknowledged in the Supreme Court of the United States. See,* 100, S.Ct. at 1881 (Powell, Burger and Blackmun, J.J., *concurring*). The "Serbonian Bog" of the exclusionary rule should not be extended to the present circumstances. Cf., *complaint in, United States v. Andrews,* 474 F. Supp. 456 at 462 (D. Colo. 1979). In view of the present circumstances and in view of *Mendenhall* and *Reid,* this Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

RESPECTFULLY SUBMITTED, on this day of February, 1981, at Miami, Dade County, Florida.

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